

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RUSSELL E. SMITH
Claimant

VS.

ATCHISON CASTING CORPORATION
Respondent,
Self-Insured

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Docket No. 234,782

ORDER

Claimant appealed the October 13, 2000 Award entered by Administrative Law Judge Bryce D. Benedict. The Board heard oral argument on February 15, 2001.

APPEARANCES

James E. Martin of Overland Park, Kansas, appeared for claimant. John B. Rathmel of Overland Park, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. Additionally, at oral argument before the Board, the parties stipulated that claimant had a five percent whole body functional impairment from his back before he began working for respondent.

ISSUES

Claimant alleges that he injured his back in a series of accidents while working for respondent through his last day of work on May 30, 1998. Respondent alleges that claimant had preexisting degenerative disk disease and that claimant's current back problems are the natural progression of that disease process.

In the October 13, 2000 Award, Judge Benedict determined that claimant was exaggerating his symptoms and, therefore, found that claimant failed to prove he either injured or aggravated his back while working for respondent. The Judge denied claimant's request for benefits.

Claimant contends Judge Benedict erred. Claimant argues that he injured his back beginning in June 1996 when he changed job duties and began performing the much more strenuous duties of a maintenance mechanic. Claimant requests the Board to (1) find his pre-injury average weekly wage to be \$890.30; (2) award him temporary total disability benefits from June 1, 1998, through February 8, 2000; and (3) award him benefits for either a permanent total disability or a work disability (a permanent partial general disability greater than the functional impairment rating). Claimant argues that each and every reason the Judge gave to deny benefits was either an exaggeration, misstatement, or simply incorrect.

Conversely, respondent contends the Award should be affirmed. Respondent argues that claimant is not credible and the only basis to link claimant's back injury to work is claimant's testimony. Respondent requests the Board to (1) deny claimant all benefits; (2) assess costs against claimant; and (3) order the Workers Compensation Fund to reimburse respondent for the monies paid in this claim.

The issues before the Board on this appeal are:

1. Did Claimant either permanently injure or permanently aggravate his back while working for respondent as a maintenance mechanic from June 1996 through his last day of work on May 30, 1998?
2. If so, what is the nature and extent of claimant's injuries and disability?
3. If so, what are claimant's pre- and post-injury wages for purposes of computing the permanent partial disability benefits?
4. Is claimant entitled to receive temporary total disability benefits for the period from June 1, 1998, through February 8, 2000?
5. Should claimant be assessed the administrative costs incurred in this claim?
6. Should the Workers Compensation Fund be ordered to reimburse respondent for the benefits paid in this claim?

FINDINGS OF FACT

After reviewing the entire record, the Board finds:

1. In May 1994, claimant began working for respondent, who manufactures such items as locomotive undercarriages and Caterpillar turbines. In approximately June 1996, respondent transferred claimant from a machinist position to that of a maintenance mechanic.

2. The maintenance mechanic job was much more physically demanding. Once claimant began doing that job, he began to aggravate his back as he developed numbness in his left thigh and shooting pains into his leg. While continuing to work for respondent, claimant's symptoms progressively worsened.

3. Before working for respondent, claimant had injured his back in approximately 1992 when he rolled an 18-wheeler while working for Keim Transportation (Keim). Shortly after that accident, claimant left Keim because of back symptoms and began working for Alamo Group (Alamo) as a fabricator.¹ After Alamo, claimant then worked as a certified nurses aide for Jefferson County Memorial Hospital. After the truck accident, while working for those various employers, claimant experienced occasional back pain.

4. In 1993, claimant applied for employment with respondent. Claimant advised respondent about a pending workers compensation claim with Keim and respondent advised claimant that it could not hire him until he resolved the claim. When that claim settled, claimant returned to respondent and was hired as a horizontal boring machine machinist. At oral argument before the Board, the parties stipulated that claimant had a five percent whole body functional impairment from his back before he began working for respondent.

5. Although he was only 35 years old as of the August 2000 regular hearing, claimant has significant degenerative disk disease in his spine. A CT scan and x-rays taken in May 1998 indicated that claimant has lumbar scoliosis with degenerative changes; an old compression fracture at L4; multiple degenerative disk disease problems; spinal stenosis; and disk bulging, particularly at L4-L5 and some at L5-S1 with narrowing of the canal and some foraminal encroachment.

6. The Board finds and concludes that claimant injured his back while working for respondent as a maintenance mechanic through his last day of work on May 30, 1998. That finding is partially based upon the testimony of claimant, who testified how his symptoms progressively worsened while doing the heavy manual labor required of a maintenance mechanic. That conclusion is also based upon the testimony of Dr. Sergio Delgado, who examined claimant at Judge Benedict's request for the specific purpose of determining whether claimant's work activities either aggravated or accelerated his back condition and who found that claimant's work for respondent aggravated and caused additional spinal nerve impingement. Additionally, Dr. Edward Prostic, who evaluated claimant at his attorney's request, testified that claimant injured his back while working for respondent.

The Board is mindful that Dr. Michael J. Poppa and Dr. David K. Ebelke, both of whom were hired either by respondent or its adjusting company, indicated that claimant did

¹ Preliminary Hearing, January 13, 1999; pp. 41, 42.

not permanently aggravate his back while working for respondent. But even Dr. Ebelke testified that claimant's work most likely caused symptoms and that claimant may have gone longer without symptoms had he been in a sedentary job.

The Board is persuaded by Dr. Delgado's causation opinion as he evaluated claimant in his role as a neutral physician. Further, the Board believes that claimant's work was such that it was likely to injure and aggravate claimant's arthritic back.

7. In June 1999, Dr. Robert M. Beatty operated on claimant's back and performed an L2-L3 hemilaminotomy and discectomy. The only doctor to testify who saw claimant after that surgery was Dr. Prostic. Based upon Dr. Prostic's testimony, the Board finds that claimant now has a 25 percent whole body functional impairment following the injuries he sustained while working for respondent. Likewise, based upon Dr. Prostic's testimony, the Board also finds that claimant has lost the ability to do 16 of 28, or 57 percent, of the work tasks that he performed in the 15 years before this injury.

The Board has adopted Dr. Prostic's functional impairment and task loss opinions in which he focused upon claimant's physical problems and separated out the psychological component of claimant's symptoms. The reason for focusing on the physical component of claimant's injuries is that the record fails to establish, as no expert was asked, whether or not claimant's psychological problems were caused or aggravated by the work-related injury.

8. Claimant's average weekly wage is \$778.78, which is calculated by adding together his \$475.60 per week base rate (\$11.89 per hour x 40 hours per week); shift differential and overtime pay of \$101.46 per week;² profit sharing pay of \$16.52 per week;³ and additional compensation items of \$185.20 per week (\$4.63 per hour x 40 hours per week).

In the 26 weeks before May 30, 1998, claimant received two checks for \$514.19 each identified as vacation pay. That pay was not included in the average weekly wage computation as it is not one of the additional compensation items included in the wage formula as contained in K.S.A. 44-511 (Furse 1993).

9. Dr. Beatty initially took claimant off work beginning June 1, 1998. After seeing various doctors, claimant eventually underwent back surgery in June 1999. It is claimant's uncontroverted testimony that Dr. Beatty released him to return to work on February 8,

² Claimant introduced a wage statement at the deposition of Allan Hundley, who is respondent's health and safety supervisor. The shift differential and overtime pay was determined by subtracting claimant's \$475.60 weekly base wage from his weekly gross compensation. The amount that the gross compensation exceeded the base wage was then averaged over the last 26 weeks that claimant worked for respondent.

³ During the 26-week period before claimant's last day of work, respondent paid him a total of \$429.50 in profit sharing monies, which averages \$16.52 per week.

2000. The Board finds claimant was temporarily and totally disabled from working from June 1, 1998, through February 8, 2000.

10. At the time of the August 2000 regular hearing, claimant was unemployed and had not worked since his last day of work for respondent on May 30, 1998. After being released by Dr. Beatty, claimant contacted respondent about returning to work. But respondent did not respond. In April 2000, claimant contacted between 25 and 30 Leavenworth-area companies where he thought he had the ability to work. Claimant has limited his search to the Leavenworth area as he is taking medication which, according to claimant's uncontroverted testimony, may cause hallucinations and adversely affect his ability to drive. As of the regular hearing, claimant was staying in contact with the companies that he had approached in the event of an appropriate job opening.

CONCLUSIONS OF LAW

1. The Award, which denied claimant's request for benefits, should be reversed. Claimant is entitled to workers compensation benefits for the permanent aggravation and permanent injury to his back that resulted while working for respondent as a maintenance mechanic from June 1996 through May 30, 1998. Claimant is entitled to receive permanent partial general disability benefits for a 74 percent work disability. Additionally, claimant is entitled to receive temporary total disability benefits for the period from June 1, 1998, through February 8, 2000.

2. The Board concludes that claimant injured his back while working for respondent as a maintenance mechanic from June 1996 through his last day of work on May 30, 1998. Because a back injury is an "unscheduled" injury, the permanent partial general disability is determined by the formula set forth in K.S.A. 1997 Supp. 44-510e, which provides, in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*⁴ and *Copeland*.⁵ In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption against a work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job that the employer had offered and which paid a comparable wage. In *Copeland*, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that workers' post-injury wages should be based upon their ability to earn rather than their actual wages when they fail to make a good faith effort to find appropriate employment after recovering from their injuries.

If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .⁶

3. At the time of the August 2000 regular hearing, claimant was unemployed and, therefore, had a 100 percent wage loss. Considering claimant's injuries and his uncontroverted testimony that he was limited in his ability to drive and, therefore, limited to looking for jobs in the Leavenworth area, the Board finds that claimant has made a good faith effort to find appropriate employment. Therefore, the actual wage loss of 100 percent should be used in the permanent partial general disability formula.

4. Averaging claimant's 57 percent task loss with the 100 percent wage loss creates a 79 percent permanent partial general disability.

5. The Workers Compensation Act requires all compensation awards to be reduced by the amount of preexisting functional impairment.⁷ Therefore, claimant is entitled to receive benefits for a 74 percent (79 percent - 5 percent) permanent partial general disability.

6. Because claimant was unable to work from June 1, 1998, through February 8, 2000, he is entitled to receive temporary total disability benefits for that period.

7. Claimant is entitled to receive reasonable and necessary medical treatment for his injuries. Therefore, respondent is required to pay the authorized medical expense associated with this claim, along with unauthorized medical benefits up to the \$500

⁴ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

⁵ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

⁶ *Copeland*, p. 320.

⁷ See K.S.A. 1997 Supp. 44-501(c).

statutory maximum. Moreover, claimant may apply to the Director for future medical treatment.

8. Respondent's requests for costs to be assessed against claimant and for reimbursement from the Workers Compensation Fund are denied.

AWARD

WHEREFORE, the Board reverses the October 13, 2000 Award. Claimant is entitled to receive the following benefits:

Russell E. Smith is granted compensation from Atchison Casting Corporation for a May 30, 1998 accident and resulting disability. Based upon an average weekly wage of \$778.78, Mr. Smith is entitled to receive 88.29 weeks of temporary total disability benefits at \$351 per week, or \$30,989.79, plus 196.61 weeks of permanent partial disability benefits at \$351 per week, or \$69,010.21, for a 74 percent permanent partial general disability, making a total award of \$100,000.00.

As of April 20, 2001, there is due and owing to the claimant 88.29 weeks of temporary total disability compensation at \$351 per week, or \$30,989.79, plus 62.43 weeks of permanent partial general disability compensation at \$351 per week, or \$21,912.93, for a total due and owing of \$52,902.72, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$47,097.28 shall be paid at \$351 per week until paid or until further order of the Director.

Claimant is entitled to receive authorized medical benefits for this injury and unauthorized medical benefits up to the \$500 statutory maximum. Additionally, claimant may apply to the Director for future medical treatment.

The administrative costs, including the court reporter fees, are assessed against the respondent as set forth in the Award.

IT IS SO ORDERED.

Dated this ____ day of April 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James E. Martin, Overland Park, KS
John B. Rathmel, Overland Park, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director